Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT A. BIRD,

Petitioner,

v.

THE COMMONWEALTH OF KENTUCKY

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the Supreme Court of Kentucky erroneously hold that no double jeopardy violation occurs if the Commonwealth attempts criminal prosecution against a person for trafficking in a controlled substance when that person has fully paid, in response to separate tax prosecution by the Commonwealth, a Kentucky Controlled Substances Excise Tax (including penalty and interest) assessed after the person was arrested on the trafficking charge, and which tax was assessed in regard to the same controlled substance for which the person is being criminally prosecuted?

2) What test(s) should this Court employ to determine whether assessing and collecting money through tax proceedings prohibits parallel criminal prosecution under the double jeapordy clause?

3) If double jeopardy protections should be found inapplicable to tax proceedings such as involved in this case, what other federal constitutional protections, if any, should the lower courts consider applicable to this case on remand?

PARTIES TO PROCEEDING BELOW

The proceeding below involved criminal prosecution by the Commonwealth of Kentucky (Respondent in proceedings before this Court) against Robert A. Bird (Petitioner in proceedings before this Court) and Joseph Nicholson ("Nicholson"). Petitioner represents only his own interests in proceeding before this Court, Nicholson being represented by separate counsel throughout all proceedings below. However, Nicholson has also filed a Peition for Writ of Certiorari which was served on undersigned counsel on February 11, 1999.

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Robert A. Bird respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix A) is reported at 979 S.W.2d 915 (Ky. 1998). The opinion of the Court of Appeals of Kentucky (Appendix B) is unreported. The opinion of the circuit court of Fayette County, Kentucky (Appendix C) is also unreported.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on November 19, 1998. *See* Appendix, A. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

In the event this Court should find the Double Jeopardy Clause inapplicable to criminal prosecutions following tax proceedings which punish, Petitioner Bird would invite consideration of whether either the Due Process Clause of the Fourteenth Amendment or the Excessive Fines Clause of the Eighth Amendment applies to the facts of this case. The Due Process Clause provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV, Section 1; the Excessive Fines Clause provides "Excessive bail shall

not be required, nor excessive fines imposed..." U.S. Const. Amend.VIII

The provisions of the Kentucky Controlled Substances Excise Tax involved in this case are set forth in the Appendix at D.

STATEMENT OF THE CASE

In July 1995, the Lexington-Fayette Urban County Police Department arrested Robert A. Bird ("Bird") (along with Joseph Nicholson) and charged Bird with trafficking in cocaine, possession of drug paraphernalia, and possession of marijuana. The police seized small quantities of powder cocaine in connection with Bird's arrest. After the arrest and seizure, the Lexington police department filed a notice of seizure with the Kentucky Revenue Cabinet pursuant to Kentucky Revised Statutes [hereafter KRS] 138.880. The Kentucky Revenue Cabinet, in response to the information provided by the police in connection with Bird's arrest and before an indictment had been returned in the criminal proceeding; assessed a tax, penalty, and interest on the powder cocaine seized. Bird negotiated with the Kentucky Revenue Cabinet and paid the tax. *See* Appendix at C. The subject tax, including penalty and interest, was more than four times the market value of the cocaine seized. *See* Appendix at C-2. Had Bird not paid the tax, penalty, and interest to the Cabinet's satisfaction, the Commonwealth would have been authorized under KRS 131.150 to attach and seize any other assets owned by Bird unrelated to his involvement with any controlled substances. *See* Appendix E.

Despite having imposed penalty on Bird in regard to the seized cocaine through the tax proceedings, the

Commonwealth continued with its criminal prosecution in relation to the same cocaine in Fayette circuit court. Believing that the tax paid to the Revenue Cabinet constituted prior punishment for double jeopardy purposes, Bird moved in the trial court to have the trafficking in cocaine count of his indictment dismissed. *See* Appendix at C-1. On February 23, 1996, the trial court granted this motion, keeping jurisdiction of the case in regard to the other counts of the indictment. *See* Appendix at C-1.

The Commonwealth appealed this ruling, but the Kentucky Court of Appeals affirmed the trial court on August 15, 1997, agreeing with Bird that under governing federal double jeopardy precedent the drug tax payment prevented the Commonwealth from prosecuting the trafficking charge. *See* Appendix at B-1. The Commonwealth appealed to the Kentucky Supreme Court, before whom Bird continued to argue that prosecution of the trafficking charge was barred by the federal double jeopardy clause. *See* Appendix at A-1. On November 19, 1998, the Kentucky Supreme Court issued its opinion, reversing the intermediate appellate court. It is in response to that ruling of the Kentucky Supreme Court which Bird files the instant petition seeking certiorari.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve an irreconcilable conflict among state and federal courts.

On November 19, 1998 two decisions about the constitutionality of similar drug tax proceedings were rendered by the highest courts of two states. *Commonwealth v. Bird*, 979 S.W.2d 915 (Ky. 1998); *Commissioner of*

Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998). Both decisions were unanimous. However, the two courts reached opposite conclusions. In the Kentucky case a drug tax assessment was held not to trigger double jeopardy protections. In the Massachusetts case, a similar drug tax assessment was barred because of federal double jeopardy. Petitioner Bird seeks review in this Court of the decision of the Kentucky Supreme Court, not just because it conflicts with the decision of the Supreme Judicial Court of Massachusetts, but because the conflict represented by these two decisions extends to many more states and to at least two federal circuits.

The states and federal circuits are hopelessly split over the continuing relevance of this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) to drug tax assessments made in proceedings separate from criminal prosecutions. In *Kurth Ranch*, this Court invalidated, under the federal double jeopardy clause, a Montana drug tax proceeding instituted following a criminal prosecution. Some courts, such as the Kentucky Supreme Court in the case at bar, read *Kurth Ranch* as applying only to situations exactly or nearly identical to the facts of *Kurth Ranch*. *See also, e.g., Padavich v. Thalacker*, 162 F.3d 521 (8th Cir. 1998); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994); *Covelli v. Commissioner of Revenue*, 668 A.2d 699 (Conn. 1995), *vacated and remanded*, 518 U.S. 1031, *aff'd after remand*, 683 A.2d 737 (Conn. 1996); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *State v. Stubblefield*, 543 N.W.2d 743 (Neb. 1996); *State v. Ballenger*, 472 S.E.2d 572 (N.C. App. 1996), *affirmed per curiam without opinion* 481 S.E.2d 84 (N.C. 1997); *McMullin v. South Carolina Dep't of Revenue*, 469 S.E.2d 600 (S.C. 1996). Other courts, such as the Massachusetts Supreme Judicial court in *Mullins*, view

Kurth Ranch as establishing criteria which apply to all drug tax proceedings. Under those criteria, drug tax proceedings will be counted as punitive for potential double jeopardy purposes if what occurred was similar to, although not identical with, what occurred in *Kurth Ranch*. *See also, e.g., Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995); *Brunner v. Collection Div. of the Utah State Tax Comm'n*, 945 P.2d 687 (Utah 1997); *cf. Lynn v. West*, 134 F.3d 582 (4th Cir. 1998) (finding North Carolina drug tax punitive under *Kurth Ranch* criteria and requiring the state to provide all federal constitutional protections associated with criminal prosecutions in drug tax prosecutions); *People v. Maurello*, 932 P.2d 851 (Colo. App. 1997) (distinguishing former Colorado drug tax statute because of lack of anonymity features, but also further rejecting the requirement of complete identity with *Kurth Ranch* statute, finding the reasoning of courts requiring complete identity unpersuasive); *Stennett v. State*, 905 S.W.2d 612 (Tex. App. 1995) (finding drug tax sufficiently similar to *Kurth Ranch* facts to warrant double jeopardy protections), *aff'd*, 941 S.W.2d 914 (Tex. Crim. App. 1996) (affirming primarily on grounds of punitive legislative intent) .

Petitioner Bird believes that this Court's *Kurth Ranch* decision applies beyond its particular facts. To view the case as invalidating only proceedings identical to the facts of *Kurth Ranch* would trivialize the decision of this Court. Petitioner Bird will elaborate on this point *infra* Section II. The point of the *current* section, however, is to emphasize the magnitude of the split among the lower courts. As reflected in the example cases cited in the previous paragraph, and unlike the double jeopardy case law involving driver's license revocation proceedings, no clearly dominant position has emerged in the lower courts for the drug tax

cases. *Cf. South Carolina v. Price*, 1998 S.C. LEXIS 173 [December 14, 1998, Filed] (following majority position that drivers license revocation does not prohibit criminal prosecution for same conduct, and collecting cases). Unlike the drug forfeiture cases, no decision of this Court has yet set the lower courts straight about how to treat drug tax situations for double jeopardy purposes. *Cf. United States v. Ursery*, 518 U.S. 267 (1996) (treating forfeiture in relation to drug proceedings as *in rem* action to which double jeopardy provisions presumptively do not attach). Despite several recent Court decisions clarifying the meaning of, and then moving away from, the analysis in *United States v. Halper*, 490 U.S. 435 (1989), courts facing drug tax potential double jeopardy situations are still reaching opposite conclusions. *Both* sides in the current drug tax disputes believe that this Court's decisions in *Kurth Ranch*, *Ursery*, and *Hudson v. United States*, 522 U.S. 93 (1997) support their views. *Compare*, *e.g.*, *Mullins*, 702 N.E.2d at 8-12 with *Padavich*, 162 F.3d at 522-23. Because the split in the lower courts is continuing and irreconcilable, this Court's guidance is required.

When fundamental constitutional principles are interpreted in an opposite manner within the same sovereignty, respect for the rule of law is diminished. The geography of the current differences in interpretation is stark. In Indiana and Illinois, two states which border Kentucky to the north, controlled substance tax prosecutions trigger double jeopardy protections. *See Wilson*, 662 N.E.2d 415 (Ill. 1996); *Bryant*, 660 N.E.2d 290 (Ind. 1995); *People v. Hernandez*, 694 N.E.2d 1082 (Ill. App. 1998). In Kentucky, however, under the decision for which certiorari is here being sought, no double jeopardy protections attach to controlled substance prosecutions. In Connecticut, drug tax assessments instituted after criminal pleas are immune from double

jeopardy invalidation. But if one crosses the border north into Massachusetts, similar drug tax assessments are held to violate double jeopardy. *Compare Covelli*, 668 A.2d 699 (Conn. 1995), with *Mullins*, 702 N.E.2d 290 (Ind. 1995). Given the current tension between *Ballenger*, 472 S.E.2d 572 (N.C. App. 1996), (finding North Carolina's tax not punitive) and *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), (finding same tax punitive), both of which decisions were denied certiorari by this Court, it is quite possible that federal courts could be required to apply a *different* double jeopardy standard for potential *habeas* relief than was applied by the state courts in the original criminal prosecutions which are reviewed by the federal courts. *Cf.* Cory Reiss, *"Drug Tax" Overturned; Drug Dealer Cites Ruling, Asks Freedom*, page 1B, Morning Star (Wilmington, NC), January 23, 1999 [as reported by LEXIS/NEXIS database] (describing current turmoil in North Carolina system based on tension between the two decisions).

State drug tax laws are a relatively recent response to the war on drugs. It is to be expected that challenges will continue to wend their way through the state and federal systems as state prosecutors institute parallel criminal and civil proceedings and/or as other states enact similar laws. *See, e.g.*, Christopher Paul Sorrow, Note, *The New Al Capone Laws and the Double Jeopardy Implications of Taxing Illegal Drugs*, 4 S. Cal. Interdis. L.J. 323, 323 & n.1 (1995) (collecting statutes from at least twenty-six jurisdictions). Only one standard should govern double jeopardy analysis of drug tax assessments. To resolve the current conflict among lower state courts and between the fourth and the eighth circuit, this Court should grant certiorari in the instant case.

II. This Court should grant certiorari to clarify that

Kurth Ranch principles apply beyond that case's particular facts.

The decision below is an example of the "identity" approach adopted by several courts in relation to drug taxes post-*Kurth Ranch*. *See also, e.g., Milner v. State*, 658 So.2d 500 (Ala. Civ. App. 1994); *Covelli*, 668 A.2d 699 (Conn. 1995); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *Ballenger*, 472 S.E.2d 572 (N.C. App. 1996); *McMullin*, 469 S.E.2d 600 (S.C. 1996). Courts using this approach claim that unless a challenged statute on its face requires arrest before a tax assessment can be levied, which arrest deprives the "owner" of his property, *Kurth Ranch* is inapplicable. *See* Appendix at A-3; *see also, e.g., Covelli*, 668 A.2d at 705-06.

However, to require arrest and deprivation elements in the taxing statute would trivialize the *Kurth Ranch* holding. *Kurth Ranch* did not focus on any one element of the tax statute at issue as being determinative of punitive nature. Instead this Court emphasized, in line with its long-standing approach, that determination of the punitive nature of a tax statute should be based on the taxing scheme taken as a whole. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (emphasizing a totality of the circumstances approach). As the dissenting judge in a North Carolina lower court opinion noted,

> In its *Kurth Ranch* opinion, the United States Supreme Court did not hold that in order to find a tax violative of the double Jeopardy Clause, the tax must contain each of the punishment aspects in the Montana Dangerous Drug Tax. Rather, the Court held that 'taken
> as a whole, [the Montana] drug tax is a concoction of

> anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis.'

See Ballenger, 472 S.E.2d at 575 (Smith, J., dissenting, and quoting *Kurth Ranch* 511 U.S. at 783). *See also*, *e.g.*, *Covelli*, 668 A.2d at 707-08 (Katz, J., dissenting); *Bryant*, 660 N.E.2d at 295-97. This Court should clarify that exact identity with the *Kurth Ranch* factual elements is not a prerequisite double jeopardy protections will attach.

Even if this Court meant in *Kurth Ranch* that drug taxes only violate double jeopardy if imposed in connection with criminal activity, and if assessed against property which the "holder" can not legally keep, such requirements should be measured against how the drug tax is actually assessed. The court below mistakenly focused on the non-incrimination provisions of the taxing statute, mistakenly believing that because Bird theoretically could have paid the tax independently of his arrest, the statute was protected from double jeopardy invalidation. *See* Appendix at A-4.

As a preliminary matter, on the actual facts of the case below, and similar to cases from other jurisdictions, the Kentucky taxing authority in the case at bar only assessed its tax against Petitioner Bird in connection with a criminal arrest. See Appendix at B-1; *cf. also*, *e.g.*, *Bryant*, 660 N.E.2d at 297; *Mullins*, 702 N.E.2d at 5-6. The focus should not be on what the taxing agency *might* have done under the statute, but rather on what actually occurred.

But more importantly, the presence of non-incrimination provisions in a drug tax statute is a distinction without a difference. So long as the drug tax is imposed only

upon *illegal* possession of the controlled substance, the tax is being imposed for the same illegal activity which is criminally prosecuted and which triggered this Court's concern in *Kurth Ranch*. *See, e.g.*, *Lynn*, 134 F.3d at 590-91; *Bryant*, 660 N.E.2d at 296-97; *Mullins*, 702 N.E.2d at 13-17; *Brunner*, 945 P.2d at 690-91; *cf. Wilson*, 662 N.E.2d at 419-20 (construing the Indiana statute as making civil assessment due only if a person is determined in criminal proceedings to be a dealer). This Court should clarify that double punishment can not be protected by the contention that the statutory penalty could have been imposed without arrest.

If this Court intended in *Kurth Ranch* to declare unconstitutional only the exact words of the Montana drug statute and thereby to approve all other tax schemes, the *Kurth Ranch* opinion promotes formalism in the extreme. By modifying on its statute books one of the elements of the Montana statute involved in *Kurth Ranch*, a different legislature could protect its drug enforcement activities from double jeopardy invalidity, although the second state's drug tax enforcement efforts would be equivalent to what occurred in *Kurth Ranch*. This Court should grant certiorari in this case to emphasize that the approach required in *Kurth Ranch* extends beyond the precise words of the Montana statute involved in *Kurth Ranch*.

III. This Court should grant certiorari to provide guidance on other important double jeopardy issues.

A. Order of Proceedings

The instant case, unlike both *Halper* and *Kurth Ranch*, involves a civil penalty imposed *before* the attempted

criminal prosecution. The issue of whether double jeopardy protections attach in such situations to prevent a criminal prosecution has never been squarely addressed by this Court. Such a fact situation was involved in both *Ursery* and *Hudson*. However, becuase this Court ruled in both those cases that the civil proceedings were not punitive, this Court did not in either case address the government's order-of-proceedings arguments. In all proceedings below, the Commonwealth has contended that there can be no double jeopardy violation until and unless there has first been a criminal proceeding to which jeopardy unambiguously has attached. Such argument would seem foreclosed by this Court's emphasis in *Hudson* that the reason double jeopardy protections attach to proceedings labeled "civil" is because those proceedings are the functional equivalents of criminal prosecutions for double jeopardy punishment purposes. Nevertheless, a clear ruling by this Court, confirming Justice Scalia's observation that "the order of punishment cannot possibly make any difference," *Kurth Ranch*, 511 U.S. at 803 (Scalia, J., dissenting), would eliminate any confusion on this point.

B. Same offense

The court below gave as alternative basis for its finding of no double jeopardy violation that the Kentucky tax statute allegedly punished for a different offense than the criminal prosecution. *See* Appendix at A-5. The Kentucky drug tax statute requires a threshold quantity of drugs before the tax can be assessed, whereas the criminal statute requires scienter but no minimum amount of controlled substance. The Commonwealth's argument is that each statute therefore possesses elements not present in the other. *See id.*; *cf. Blockburger v. United States*, 284 U.S. 299 (1932). As with order-of-proceedings arguments, this Court has never

reached the issue of how to define the same offense across civil and criminal proceedings, including whether *Blockburger* analysis applies in such contexts. *Cf. Hudson*, 522 U.S. at __; 118 S.Ct. at 497 (Stevens, J., concurring) (applying *Blockburger* analysis to civil proceeding and finding no double jeopardy violation).

Assuming *Blockburger* type analysis would apply, this case involves two prosecutions for the same offense. The same amount of cocaine formed the basis both for assessing a civil penalty and forms the basis for the criminal charges. The lack of *mens rea* in the civil statute means the civil penalty is a lesser included offense in comparison to the criminal penalty. The Massachusetts case decided the same day as the case below specifically addressed and rejected arguments similar to those made by the Commonwealth, and its rationale could be adopted by this Court. *See Mullins*, 702 N.E.2d at 20-22 & n.16.

Blockburger, however, may not be the appropriate test for measuring double jeopardy across "civil" tax and criminal proceedings. If a tax proceeding imposes the equivalent of criminal punishment for offenses arising out the same transaction as involved in a potential criminal prosecution, a requirement that an additional element be proved in the civil prosecution from what is proved in the criminal prosecution may inadequately protect against double punishment. In purely criminal dual prosecutions, the state's burden of proof is at the absolute highest for *both* prosecutions. This, plus other constitutional protections unique to the criminal setting, may adequately safeguard against potential unfairness in allowing two criminal prosecutions arising out of the same incident. On the other hand, in a tax prosecution, it is conceivable that the state may need to prove less to obtain a punishment which nevertheless

would constitute punishment for double jeopardy purposes. Given the potentially permissible differences in civil and criminal prosecutions, even when the civil prosecutions might be found to involve double jeopardy punishment, a conduct oriented approach to same offense analysis across civil and criminal contexts might be preferable to the *Blockburger* analysis which is used in the purely criminal context.

C. Underlying double jeopardy rationales and alternative constitutional protections

As the arguments in the last paragraph imply, Petitioner Bird remains unsure how to read *Hudson, Ursery,* and *Kurth Ranch* together. This confusion seems shared by the lower courts. If *Hudson* was intended to mean that there are only purely criminal prosecutions versus only purely civil prosecutions, this message needs to be more unambiguously stated. Such arguments were made largely in the *Kurth Ranch* dissents, while *Hudson* still endorsed the majority *Kurth Ranch* approach as a proper approach to double jeopardy inquiries. *Cf., e.g., Mullins*, 702 N.E.2d at 8-10 & n.6 (reading *Kurth Ranch* as the proper analysis for drug taxes and reading *Hudson* as reemphasizing proper way to determine whether *penalty* should be deemed criminal for double jeopardy purposes). Petitioner Bird believes that the tax assessment at issue in the case at bar would trigger double jeopardy protections regardless of what test is used, but the implications for the state as to whether tax proceedings which punish must in all respects conform to the safeguards needed in criminal prosecutions are significant. *Cf. Lynn*, 134 F.3d 582 (requiring North Carolina drug tax proceedings to provide all constitutional guarantees

associated with criminal proceedings).[1]

In sum, uncertainty still exists about exactly what double jeopardy principles apply to civil proceedings which punish. Is the prohibition against successive prosecutions, or against multiple punishments in separate proceedings? Do all constitutional criminal protections extend to civil proceedings which violate double jeopardy, or is the double jeopardy concern primarily with impermissible punishment? Perhaps these questions need not all be resolved in a single Court opinion. Be that as it may, *Kurth Ranch* remains the only post-*Halper* case in which this Court has invalidated a civil proceeding under the double jeopardy clause because of its punitive nature; *Kurth Ranch* continues to be cited by this Court as good law; yet exactly how *Kurth Ranch* should be applied and what double jeopardy protections underlie it has hopelessly split the lower courts in recent drug tax prosecution cases.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

R. BURL MCCOY

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[1] Additionally, if Petitioner Bird is wrong about this case not triggering double jeopardy protections, this Court may need to emphasize that other constitutional provisions potentially have real force to protect against state overreaching, so that this case would be properly adjudicated on a remand. The court below, for example, in its opening paragraph, indicated that it deemed the issue of whether Kentucky's due process clause provided any protections for Petitioner Bird swallowed up in the double jeopardy inquiry. *See* Appendix at A-1.

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APPENDIX

APPENDIX A

COMMONWEALTH OF KENTUCKY, APPELLANT
v. ROBERT A. BIRD and
JOSEPH NICHOLSON, APPELLEES

97-SC-714-DG

SUPREME COURT OF KENTUCKY

979 S.W.2d 915; 1998 Ky. LEXIS 142

November 19, 1998, Rendered

OPINION OF THE COURT BY JUSTICE STEPHENS

REVERSING

At issue is whether a criminal defendant's payment of the Kentucky Controlled Substances Excise Tax (drug tax), KRS 138.870-.990, bars subsequent criminal prosecution on federal and Kentucky double jeopardy grounds. We find that it does not. Because we find no double jeopardy problem, we need not address Appellees Bird and Nicholson's assertion that imposition of the drug tax constitutes an exercise of absolute and arbitrary power under the Section 2 of the Kentucky Constitution.

In July 1995, the Lexington-Fayette Urban County Police Department arrested and charged Robert A. Bird and Joseph Nicholson with first-degree trafficking in a controlled substance. The police seized powder cocaine from them. Finding no drug tax stamp on the confiscated cocaine, the police filed a notice of seizure with the Kentucky Revenue Cabinet as required by KRS 138.880. The Revenue Cabinet

then assessed Bird and Nicholson for nonpayment of their drug tax and penalties. Bird and Nicholson paid taxes of approximately $6,000 and $ 4,000 respectively, prior to indictment.

Thereafter, the Fayette Circuit Court dismissed the trafficking charges for violating constitutional prohibitions against double jeopardy, citing Department of Rev. Of Montana v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), the Fifth Amendment to the United States Constitution, and Section 13 of the Kentucky Constitution. The Court of Appeals later affirmed, concluding that this case was similar enough to Kurth Ranch to warrant a finding that assessment and payment of the Kentucky drug tax is penal in nature and bars subsequent criminal prosecution.

In Kurth Ranch, the United States Supreme Court found that imposition of Montana's drug tax constituted a bar to subsequent prosecution for purposes of double jeopardy. As summarized by the Kentucky Attorney General in its opinion analyzing the Kentucky drug tax:

> The Montana Dangerous Drug Tax Act imposed a steep tax on possession and storage of dangerous drugs. Several features of the tax made it appear intertwined with the state's traditional criminal laws: the tax was payable only after a taxpayer was arrested for a drug-related crime, the tax return was filled out by law enforcement authorities, and the tax res was confiscated and destroyed. These features conditioned liability for the tax on the commission of a crime.

1995 Op. Ky. Att'y Gen. 13 (discussing Kurth Ranch, 511 U.S. at 770-71, 114 S.Ct. at 1941-42, 128 L. Ed. 2d at 773-74). The United States Supreme Court found that

imposition of Montana's drug tax did violate double jeopardy prohibitions because it punished conduct that had already been punished by Montana's traditional criminal drug laws.

In reaching this conclusion, the Court set forth several factors, none of which is dispositive, which courts may use to determine whether a tax has crossed the line from an exaction to a punishment:

- A high rate of taxation
- An obvious deterrent purpose
- The tax is conditioned on the commission of a crime
- The tax is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place
- The tax is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed

Kurth Ranch, 511 U.S. at 780-84, 114 S. Ct. at 1946-48, 128 L. Ed. 2d at 779-81.

Based on the above criteria, the United States Supreme Court found imposition of the Montana drug tax to be the "functional equivalent" of successive criminal prosecution. Id. at 784, 114 S. Ct. at 1948, 128 L. Ed. 2d at 781. The tax rate was excessive (up to eight times the market value of the drugs seized), which indicated the Montana Legislature's intent to deter people from possessing the drugs. Id. at 780, 114 S. Ct. at 1946, 128 L. Ed. 2d at 779. What was more important, however, was the fact that the tax was conditioned on the commission of a crime. Montana's Department of Revenue did not levy the tax until after a taxpayer's arrest. There was no opportunity for a taxpayer to pay the tax beforehand. Id. at 781-82, 114 S. Ct. at 1947, 128 L. Ed. 2d at 779-80. Finally, because law enforcement officers seized the drugs and destroyed them before the tax

was levied, the tax -- purportedly a property tax -- was assessed on goods which the taxpayer did not even own or possess. Id. at 783, 114 S. Ct. at 1948, 128 L. Ed. 2d at 780-81. Thus, the Court concluded that Montana's tax was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id.

In light of Kurth Ranch, it is clear that a state may impose a drug tax only if it is levied on conduct not already punished as a crime. This is precisely what the Kentucky drug tax does: it taxes conduct not previously punished as a crime. Kentucky's Controlled Substances Excise Tax provides for anonymous tax payment, which is due "immediately upon the occurrence of taxable activity," [1] and precludes the use of tax information in criminal prosecutions. KRS 138.886(1, 3). Once the tax has been paid, the Revenue Cabinet issues a tax stamp which is good for one year and must be affixed to the illegal drugs. KRS 138.874. If law enforcement officers arrest a taxpayer and seize the taxpayer's drugs, the officers must report the seizure to the Revenue Cabinet if they do not see tax stamps on the confiscated drugs. KRS 138.880. The Revenue Cabinet then levies the tax and the taxpayer must file a return.

We find that Kentucky's drug tax is valid because it does not contain enough of the Kurth Ranch features to cross the line from an exaction to a punishment. Although part of the purpose of the tax is to deter drug dealing, its larger

---

[1] "Taxable activity" includes "producing, cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing more than five (5) marijuana plants with foliation, 42.5 grams of marijuana which has been detached from the plant on which it grew, seven (7) grams of any controlled substance, or fifty (50) or more dosage units of any controlled substance which is note sold by weight." KRS 138.871(4).

remedial purpose is to raise revenue to reimburse the Commonwealth for drug education, prevention, treatment and law enforcement. 1994 Ky. Acts ch. 315. The tax rate of two times the estimated market value of the controlled substance is not excessive. The United States Supreme Court has permitted much higher taxes to withstand constitutional scrutiny. See, e.g., United States v. Sanchez, 340 U.S. 42, 71 S. Ct. 108, 95 L. Ed. 47 (1950) (sustaining the $100-per-ounce federal tax on marijuana) (cited in Kurth Ranch, 511 U.S. at 781, 114 S. Ct. at 1947, 128 L. Ed. 2d at 779). Moreover, Kentucky law permits any harmful activity "to be taxed so high as to prohibit its being carried on except at a financial loss[,] thus taxing it out of business." Peel v. Dummit, Ky., 308 Ky. 399, 214 S.W.2d 605, 607 (1948).

In addition, under Kentucky's statutes, assessment and payment of the drug tax is not contingent on the commission of a crime. The tax is levied regardless of whether the taxpayer has been arrested for criminal conduct since taxes are due immediately upon the occurrence of the taxable activity. KRS 138.874. Accordingly, the tax is not levied on confiscated property; rather, it is an excise tax levied upon a taxable activity: dealing in illegal drugs. KRS 138.872.

But even if assessment and payment of Kentucky's drug tax were more like a criminal punishment than a tax, there still would be no double jeopardy violation because there is no identity of offenses. A single course of conduct establishes more than one offense if the conduct violates two distinct statutes and if each statute requires proof of an element that the other does not. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 811 (1996) (citing Blockburger v.United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932)). Kentucky's trafficking statute has a scienter requirement and imposes liability for trafficking in

any amount of a controlled substance.[2] The drug tax, however, has no scienter requirement and is only levied if the taxpayer possesses at least seven grams of a controlled substance or 50 dosage units.[3] Therefore, one could be arrested and convicted of trafficking in a controlled substance, yet not be assessed a drug tax.

As the Attorney General of Kentucky noted in its 1995 opinion:

> "The General Assembly has succeeded in establishing liability for the tax as a distinct and independent sphere of activity that is not connected in any material respect with a criminal prosecution. A person may be liable for the tax even if no prosecution is undertaken, or if a prosecution is unsuccessful. In fact, it is entirely possible for a person to obtain the stamps and pay the tax without heightening the risk of prosecution. For this reason, the holding in the Kurth Ranch case is totally inapplicable to the Kentucky tax."

1995 Op. Ky. Att'y Gen. 13. We agree and find that assessment and payment of the Kentucky Controlled Substances Tax does not bar subsequent criminal prosecution on federal and Kentucky double jeopardy grounds. The order of the Court of Appeals is reversed.

All concur.

---

[2] A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; or phencyclidine.

[3] See supra note 1.

APPENDIX B

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 96-CA-0666-MR

COMMONWEALTH OF KENTUCKY APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 95-CR-1044

ROBERT A. BIRD and
JOSEPH NICHOLSON APPELLEES

OPINION

AFFIRMING

*** *** *** ***

BEFORE: EMBERTON, HUDDLESTON, and MILLER, Judges.

MILLER, JUDGE: The Commonwealth of Kentucky brings this appeal from a February 23, 1996, order of the Fayette Circuit Court. We affirm.

The facts are these: In July 1995, Robert A. Bird and Joseph Nicholson were arrested and charged with trafficking in a controlled substance in the first degree. Seized in the arrest were 9.8 grams of powder cocaine. Pursuant to the Kentucky Controlled Substances Excise Tax, codified as

KRS 138.870-.990, Bird and Nicholson were assessed a tax upon the 9.8 grams. Consequently, Bird paid the Revenue Cabinet approximately $6,000.00, and Nicholson paid some $4,000.00. On November 27, 1995, the Fayette County Grand Jury indicted Bird and Nicholson for the offenses of trafficking in the controlled substance, first degree (Ky. Rev. Stat. (KRS) 218A.1412), and one count of possession of drug paraphernalia (KRS 218A.500). Bird was also charged with possession of marijuana (KRS 218A.1422).

Bird and Nicholson filed a motion to dismiss, claiming that count I of the indictment charged an offense for which they were previously punished by payment of the tax. They argued that such multiple punishment constituted a violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. On February 23, 1996, the circuit court agreed and dismissed count I of the indictment. This appeal follows.

The Commonwealth contends the circuit court committed reversible error by dismissing count I of the indictment charging Bird and Nicholson with trafficking in a controlled substance, first degree. We disagree. We are persuaded by the reasoning of the Supreme Court of the United States in Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L.Ed. 2d 767 (1994), wherein the Court held that Montana's Dangerous Drug Tax Act violated the constitutional prohibition against successive punishments for the same offense. We believe the case sub judice sufficiently similar to Kurth Ranch to warrant reliance thereupon and, as such, are of the opinion that the circuit court did not commit reversible error by dismissing count I of the indictment against Bird and Nicholson.

No reasonable argument can be made that the Controlled Substance Excise Tax is promulgated to obtain revenue for the state; rather, its obvious purpose is to eliminate to proliferation of controlled substances. When the Commonwealth chooses to exact a heavy tax intended to restrict or abolish illegal or what it deems undesirable substances, the assessment is penal in nature and falls within the ambit of the double jeopardy clauses of the state and federal constitutions. The Commonwealth is then compelled to act accordingly. It cannot impose double punishment for "a single course of conduct." See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and Jones v. Commonwealth, Ky., 756 S.W. 2d 463 (1988); and KRS 505.020.

For the foregoing reason, the order of the circuit court is affirmed.

HUDDLESTON, JUDGE CONCURS IN RESULT ONLY.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION

EMBERTON, JUDGE, DISSENTING: I respectfully dissent. I believe the majority mistakenly relies on Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L. Ed. 2d 767 (1994). Kurth does not stand for the proposition that all state statutes providing for assessment of taxes on those engaging in illegal drug activity violate the double jeopardy clause when both assessment and prosecution occur.

In Kurth, the Supreme Court, in a 5-4 opinion, held the Montana statute to be penal for reasons based only on certain provisions therein; provisions not found in the statute before us. Among others discussed, it points particularly to the provision that a taxpayer had no obligation to pay any tax

unless and until he was arrested. Those characteristics found objectionable by the Kurth court being absent from the statute here, I would reverse the trial court and direct that it reinstate the indictments.

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APPENDIX C

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. OPINION AND ORDER IND. NO. 95-CR-1044

ROBERT A. BIRD and
JOSEPH NICHOLSON DEFENDANTS
Ct. 1 Trafficking in a Controlled Substance First Degree
Ct. 2 Possession of Drug Paraphernalia
Ct. 3 Possession of Marijuana

****

OPINION

This matter is before the Court on the defendants' motion to dismiss on the grounds that they were previously assessed and thereafter paid a tax for the controlled substances on which Count 1 of the within indictment is based a prosecution under Count 1, therefore, constitutes a violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution. We agree and sustain the defendants' motions.

KRS 138.870-.889 imposes a tax on the "selling, using, or otherwise possessing...of any controlled substance" *Id.* .870-.872.

In *Department of Revenue of Montana v. Kurth Ranch*, 128 L.Ed. 2d 767 (1994), the Supreme Court considered for the first time whether a tax may be characterized as punitive and therefore violative of the constitutional prohibition against successive punishment for the same offense. The Court found the Montana tax offended the Double Jeopardy Clause. In so finding, the Court noted several factors that it considered in making the determination.

First, the Court noted the high rate of the tax (eight times the market value) and the deterrent purpose of the tax. *Id.* 779. These factors, in and of themselves, were not considered by the Court to be dispotive of whether the tax was punitive but "[lent] support to the characterization of the drug tax as punishment..." *Id.* 779. The subject tax, including penalty and interest, is more than four times the market value, and the purpose of the tax is to deter drug trafficking.[1]

Next, it was noted that the "so-called tax" was conditioned on the commission of a crime which "is significant of penal and prohibitory intent rather than the gathering of revenue." *Id.* 779-780. Likewise, Kentucky's tax is not imposed upon a person lawfully engaged in the selling or possessing of a controlled substance. KRS 138.872(3).

Finally, the Court noted that "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."

[1] The sponsors of the legislation which enacted the tax explained that the "bill imposes a tax on marijuana and illegal drugs to take the profit out of drug trafficking." Minutes of the House Committee on Appropriations and Revenues, 1994 Regular Session, Meeting #8 (March 1, 1994) (House Bill 171).

Id. 781. The defendants' controlled substances will ultimately be destroyed, KRS 218A.1404(2), and were never lawfully possessed by them. KRS 218A.230(1).

The Commonwealth concedes that the subject tax and this criminal prosecution are separate proceedings. Accordingly, we must find that the prosecution of the defendants under Count 1 of the Indictment is prohibited by the Double Jeopardy clause.

ORDER

Count 1 of the Indictment is hereby dismissed.

This matter is docketed for a status hearing at 8:30 a.m. on Friday, March 1, 1996.

JAMES E. KELLER
JUDGE

APPENDIX D

KRS 138.870 provides:

> (3) "Dealer" means a person who engages in this state in a taxable activity as defined in subsection (4) of this subsection.

KRS 138.872, in part, provides:

> (1) A tax is hereby levied on each dealer engaged in a taxable activity in this State. The tax shall be paid at the following rates:...
>
> (c) $200.00 on each gram, or portion thereof, of controlled substances;...
>
> (3) A dealer lawfully engaged in a taxable activity shall be exempt from the tax imposed by this section if the dealer is not in violation of any law which authorizes him to engage in the activity.

KRS 138.889 Penalties, provides:

> (1) Any dealer violating KRS 138.870 to 138.889 shall in addition to paying the tax imposed pursuant to KRS 138.872, pay a penalty equal to one hundred percent (100%) of the tax due...
>
> (2)(a) any dealer failing to affix the appropriate tax stamps, labels, or other tax indicia to any...controlled substance as required by KRS 138.874 is guilty of a Class C felony.

APPENDIX E

KRS 131.150. Jeopardy assessments:

(2) Under any of the circumstances set out in subsection (1) of this section, the cabinet may make tentative assessment or determination of the taxes due, and may proceed immediately to bring garnishment, attachment or any other legal proceedings to collect the taxes so assessed or determined to be due. No bond shall be required of the department in such proceedings.

Supreme Court, U.S.
FILED
APR 27 1999
OFFICE OF THE CLERK

No. 98-1331

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT A. BIRD — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision of the Kentucky Supreme Court in Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998) is in conflict with the decision of this Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

II. Whether the assessment of and payment by petitioner, Robert Bird, of the Kentucky Controlled Substance Excise Tax bars subsequent criminal prosecution for possession or trafficking in the controlled substance on federal constitutional double jeopardy grounds.

III. Whether the double jeopardy analysis endorsed in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) should be expanded or limited.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; (2) Mr. Robert A. Bird. A related certiorari petition has been filed by Mr. Joseph Nicholson in the United States Supreme Court, File No. 98-1297.

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No. 98-1331

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT A. BIRD — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Comes the Commonwealth of Kentucky, by counsel, and pursuant to Order of this Court submits this brief in response to the petition for a writ of certiorari.

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendices thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL PROVISION INVOLVED

The petitioner asserts the double jeopardy clause of the Fifth Amendment to the United States Constitution as the constitutional provision involved. That clause states in relevant part as follows: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

The petitioner also "invites consideration of whether the Due Process Clause of the Fourteenth Amendment or the Excessive Fines Clause of the Eighth Amendment applies[sic] to the facts of this case". Consideration of the application of these additional federal constitutional clauses to the facts of this case would be inappropriate on certiorari review because: (1) the petitioner paid his Kentucky Controlled Substance Excise Tax, and did not appeal the assessment to the Kentucky courts; and (2) the petitioner did not make these additional claims in his state court litigation. Adams v. Robertson, 520 U.S. ____, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997).

COUNTERSTATEMENT OF THE CASE

Kentucky does not quarrel with the facts as set forth in the petitioner's statement of the case, with this caveat: The petition incorrectly indicates at page 2 that the tax assessment was four times the market value of the cocaine seized. Petitioner obtains this inflated figure by adding the late payment penalty to the $200 per gram assessment. A late payment penalty for the failure to timely pay a tax is an assessment separate from the tax assessment, itself.

ARGUMENT

I.

THE OPINION OF THE KENTUCKY SUPREME COURT IN COMMONWEALTH OF KENTUCKY V. BIRD, KY., 979 S.W.2D 915 (1998) IS NOT IN CONFLICT WITH THE OPINION OF THIS COURT IN MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994).

The specific issue addressed by this Court in its Kurth Ranch opinion was:

> . . . whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.

Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 769, 114 S.Ct. 1937, 128 L.Ed.2d 767, 772-773 (1994). Conversely, the issue addressed by the Kentucky Supreme Court in Commonwealth v. Bird was, in relevant part:

> . . . whether a criminal defendant's payment of the Kentucky Controlled Substances Excise Tax (drug tax), KRS 138.870-.990, bars subsequent criminal prosecution on federal . . . double jeopardy grounds.

Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998). The Kurth Ranch opinion did not address "the question whether an ostensively civil proceeding that is [allegedly] designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character". Id., 511 U.S. 767, 781, 114 S.Ct. 1937, 128 L.Ed.2d 767, 780, at f.n. 21. The precise issue before the Kentucky Supreme Court in Commonwealth v. Bird was not addressed in the Kurth Ranch opinion.

Those anomalous features of the former Montana drug tax which were essential to the Kurth Ranch holding are not present in Kentucky's Controlled Substances Excise Tax Statutes (KRS 138.870-138.990). In United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135

L.Ed.2d 549, 564 (1996), the United States Supreme Court summarized its Kurth Ranch holding as follows:

> In Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994), we considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when the taxpayer had already been criminally convicted of owning the marijuana which was taxed. We first established that the fact that Montana had labeled the civil sanction a 'tax' did not end our analysis. We then turned to consider whether the tax was so punitive as to constitute a punishment subject to the Double Jeopardy Clause. Several differences between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax. We also noted that the taxpayer did not own or possess the taxed marijuana at the time that the tax was imposed. From these differences, we determined that the tax was motivated by a '"penal and prohibitory intent rather than the gathering of revenue."' . . . Concluding that the Montana tax proceeding 'was the functional equivalent of a successive criminal prosecution.' we affirmed the Court of Appeals' judgment barring the tax . . .

(Emphasis added).

Kentucky's Controlled Substances Excise Tax does not subject only those charged with a criminal offense to taxation. The tax is due

and payable regardless of whether one has been charged with a criminal offense. KRS 138.874(1); 138.870(4). Even though the activity taxed is illegal activity, not all such illegal activity is taxed. KRS 138.870(4). Unlike the former Montana tax, the Kentucky tax becomes due and payable at a time when the taxpayer has ownership or possession of the taxed controlled substance.

An excise tax such as Kentucky's, which is imposed as a matter of law the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, does not implicate Kurth Ranch double jeopardy concerns. By contrast, the former Montana controlled substances tax was in the nature of a property tax. It was not imposed until the taxpayer was arrested on a criminal charge relating to the taxed substance. It was not assessed until after the taxpayer had been dispossessed of the taxed substance.

Kentucky's controlled substances tax was enacted into law as Chapter 315 of the 1994 Kentucky Acts, and subsequently was codified at KRS 138.870-138.990. Chapter 315 was titled "AN ACT relating to revenue and taxation". The preamble to that enactment,

representing the collective voice of the Kentucky Legislature, sets forth a rational basis for the enactment of the revenue raising measure:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and
>
> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and
>
> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Secondarily, Chapter 315 of the 1994 Kentucky Acts might be characterized as a remedial measure. That characterization, however, would not necessarily implicate double jeopardy concerns. Precisely because "even remedial sanctions carry the sting of punishment", the question of whether a particular sanction constitutes punishment is not determined from a defendant's perspective. Kurth Ranch, supra, 511 U.S. 767, 777, 114 S.Ct. 1937, 128 L.Ed.2d 767, 777 (1994), at f.n. 14.

At pages 8-9 of the certiorari petition, the petitioner makes much of a phrase lifted from a Kentucky House of Representatives

Committee Meeting in which the sponsors of Kentucky's Controlled Substances Excise Tax Bill explained that a purpose of the bill was "to take the profit out of drug trafficking". That statement is as consistent with an intent to remove the financial incentive to engage in drug trafficking as it is with any intent to impose the functional equivalent of criminal punishment.

Liability under Kentucky's Controlled Substances Excise Tax will arise as a matter of law in most, if not all, cases before the individual engaged in taxable activity is arrested, charged with a criminal offense, and dispossessed of the controlled substances. (It, of course, is conceivable that the individual engaged in the taxable activity may never be detected, charged with a criminal offense, and dispossessed of the goods). If an individual timely pays the tax and is unable to pass the additional cost on to others, the only "punishment" he suffers as a result of payment is an inability to profitably engage in an illegal activity.

Those engaged in lawful businesses can, and do, pass taxes on to the consumer or others in the chain of distribution. One reason the result is different with respect to much of the activity taxed by

Kentucky's Controlled Substances Excise Tax is that persons engaged in such activity do not generally operate openly and visibly, and hence are more readily capable of evading the tax. The Kentucky's Controlled Substances Excise Tax, at least theoretically, is capable of being passed on through the chain of distribution.

A tax does not cease to be a tax merely because large numbers of taxpayers may dodge timely payment.

The opinion of the Kentucky Supreme Court in Commonwealth v. Bird does not conflict with the Kurth Ranch opinion.

II.

THE ASSESSMENT OF AND PAYMENT BY MR. NICHOLSON OF THE KENTUCKY CONTROLLED SUBSTANCES EXCISE TAX DOES NOT BAR A SUBSEQUENT CRIMINAL PROSECUTION FOR POSSESSION OR TRAFFICKING IN THE CONTROLLED SUBSTANCE ON FEDERAL CONSTITUTIONAL DOUBLE JEOPARDY GROUNDS.

To conclude that payment of Kentucky's controlled substances tax operates as a double jeopardy bar to a criminal prosecution for trafficking in the controlled substance, one must first conclude: (1)

that the payment of the Kentucky controlled substance tax is the functional equivalent of a criminal prosecution; (2) that there is an identity of a tax "offense" and the criminal offense; and (3) that an initial constitutional jeopardy bar attaches as the result of a tax which on its face subjects the taxpayer to neither loss of life or liberty.

Payment of Kentucky's Controlled Substance Tax is not the Functional Equivalent of a Criminal Prosecution.

The Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) conceded that the Court had never before held that a tax violated the Double Jeopardy Clause. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court conceded that the unlawfulness of an activity does not prevent its taxation. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court ultimately concluded that Montana's drug tax "is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis". Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 781.

In the recent case of Hudson v. United States, 522 U.S. ___, 118 S.Ct. ___, 139 L.Ed.2d 450 (1997), the United States Supreme Court noted that it had applied in Kurth Ranch a test similar to that set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). Hudson, supra, 139 L.Ed.2d at 461, fn. 6. The Hudson Court summarized the "guideposts" set forth in Kennedy for determining whether an ostensibly civil remedy is transformed into a criminal penalty as follows:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment--retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." Hudson, supra, 139 L.Ed.2d at 459.

The Hudson court further noted that the foregoing "factors must be considered in relation to the statute on its face", and that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty".

Id., 139 L.Ed.2d at 459 (internal citations and internal quotation marks omitted).

The Kentucky statutes, duly enacted by the Kentucky Legislature, denominate Kentucky's controlled substances tax as a tax, not a criminal penalty.

With this in mind, we turn to the "guideposts" established in the Kennedy case, supra, and applied in the Hudson case, supra. Kentucky's tax does not involve an affirmative disability or restraint as those terms are "normally understood". Hudson, supra, 139 L.Ed.2d at 462. The tax is "certainly nothing approaching the 'infamous punishment' of imprisonment". Id., 139 L.Ed.2d at 462, quoting from Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1448 (1960).

Taxes have not historically been regarded as a criminal punishment.

The Kentucky controlled substance tax contains no scienter requirement. KRS 138.870(4).

Admittedly, Kentucky's tax may serve a deterrent function, a traditional aim of punishment. The Kurth Ranch court noted,

however, "neither a high rate of taxation nor an obvious deterrent purpose automatically marks...[a]... tax a form of punishment". Id., 128 L.Ed.2d at 779. Indeed, a statute may serve a remedial purpose without constituting punishment for purposes of a double jeopardy analysis. See, e.g., Kurth Ranch, supra, 128 L.Ed.2d at 778, f.n. 16.

Admittedly, Kentucky's controlled substance tax applies to substances which it is not legal to possess, but the Kentucky controlled substance tax is due and payable regardless of whether the taxpayer has been charged with or convicted of a crime. KRS 138.870(4); 138.874(1). Moreover, the Kentucky statutes expressly provide for anonymous payment of the tax and further preclude the use of tax information in a criminal prosecution. KRS 138.874(1) and (2); KRS 138.886(1) and (2).

The Kentucky General Assembly has set forth a rational basis for establishing the tax. The preamble to the bill establishing Kentucky's controlled substances excise tax states:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and

> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and
>
> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Finally, the tax is not clearly excessive in relation to the purpose for the tax set forth in the preamble to Chapter 315 of the Kentucky Acts (1994). Indeed, the Kurth Ranch court acknowledged that the Court had sustained a "steep $100-per-ounce federal tax on marijuana in United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950)". Kurth Ranch, supra, 511 U.S. at 781, 114 S.Ct. at ____, 128 L.Ed.2d at 779.

Although there is a split among the state courts concerning the proper interpretation of the Kurth Ranch decision, a number of states which have considered the question have concluded that their controlled substances taxes do not implicate double jeopardy concerns under the Kurth Ranch holding. Those states are Alabama, Connecticut, Iowa, Kansas, North Carolina, Nebraska, Oklahoma and South Carolina. Milner v. State, 658 S.2d 500 (Ala. 1994); Covelli v.

Commissioner of Revenue Services, 668 A.2d 699 (Conn. 1995), vacated and remanded at 116 S.Ct. 2577, reaffirmed at 683 A.2d 737, cert. den. at 137 L.Ed.2d 551; State v. Sumpert, 554 N.W.2d 250 (Iowa 1996); State v. Lange, 531 N.W.2d 108 (Iowa 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); State v. Jensen, 915 P.2d 109 (Kan. 1996); State v. Ballenger, 472 S.E.2d 572 (N.C.App. 1996), affirmed at 481 S.E.2d 84, cert. den. at 137 L.Ed.2d 551; [Contra, Lynn v. West, 134 F.3d 582 (4th Cir. 1998)]; State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996); Hill v. State, 898 P.2d 155 (Okl. Cr. 1995); McMullin v. South Carolina Department of Revenue and Taxation, 469 S.E.2d 600 (S.C. 1996).

At least one federal circuit has issued an opinion consistent with the foregoing state cases. Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998) (cert. petition pending).

A tax such as Kentucky's, which is imposed the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, may fairly be said not to be the functional equivalent of a criminal prosecution. This is

particularly true given the deference which customarily is accorded legislative bodies in legislative matters.

Even if Kentucky's Tax is the Functional Equivalent of a Criminal Prosecution, There is no Identity of Offenses.

There is no identity of offenses pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger analysis applies in both the multiple punishment and multiple prosecution contexts. Witte v. United States, 515 U.S. ___, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995).

Even if Kentucky's controlled substance tax statute were deemed to punish a criminal offense, it does not "punish" the same "offense" as the criminal statute (KRS 218A.1412) pursuant to which Mr. Bird and Mr. Joseph Nicholson were charged in the case at bar. Liability for the Kentucky controlled substances tax arose by operation of law prior to the arrest of Mr. Bird and Mr. Nicholson. KRS 138.174(1). Criminal liability under KRS 218A.1412 arose when Mr. Bird and Mr. Nicholson were arrested. The Kentucky controlled substances tax, unlike the criminal statute, contains no scienter requirement. KRS 138.870(4); KRS 218A.1412. KRS 218A.1412

imposes liability for trafficking in any amount of a controlled substance. Kentucky's controlled substances tax, however, requires proof of the producing, cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing at least seven grams of a controlled substance or fifty or more dosage units. KRS 138.870(4).

III.

MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994) SHOULD BE LIMITED TO ITS FACTS, ABROGATED OR OVERRULED.

When jeopardy initially attaches in a criminal prosecution, then punishment imposed in an ostensibly civil proceeding which is the functional equivalent of a criminal prosecution may violate double jeopardy principles. Jeopardy clearly attaches initially in the criminal proceeding.

Undersigned counsel knows of no United States Supreme Court case or Kentucky Supreme Court case which has held that a civil proceeding which subjects an individual to neither loss of life or liberty nevertheless raises a jeopardy bar to a subsequent criminal

prosecution because the civil proceeding is the "functional equivalent" of a criminal prosecution. If there is no initial jeopardy under the federal or state constitutions, then there can be no double jeopardy.

No sound reasons exist for extending the Kurth Ranch holding beyond the facts of that case. As the United States Supreme Court recently noted in the Hudson case, supra, "[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational". Id., 139 L.Ed.2d at 461. As the Hudson court further noted:

> The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and non-punitive" penalties. Id., 139 L.Ed.2d at 461.

The Kurth Ranch opinion has been the subject of extensive litigation in state and federal courts. Should the Court grant certiorari review in the case at bar, the Court is requested to limit abrogate or overrule the Kurth Ranch double jeopardy analysis. Application of a double jeopardy analysis to tax enactments presents

the same pitfalls as does application of a double jeopardy analysis to civil penalties.

CONCLUSION

WHEREFORE, certiorari review should be denied.

Respectfully submitted,

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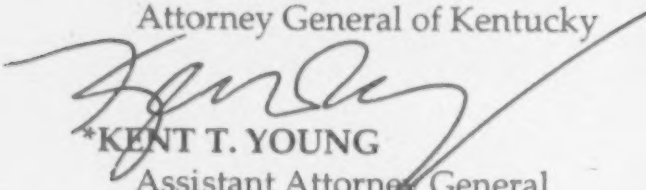

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In The

Supreme Court of the United States

ROBERT A. BIRD,

Petitioner,

v.

THE COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Bird files this Reply Brief pursuant to Supreme Court Rule 15.6.

In its Brief in Opposition [hereafter Opp], the Commonwealth primarily argues the merits of this case. The Commonwealth's brief reinforces why certiorari should be granted. The Commonwealth concedes either directly or by implication the validity of the reasons for granting certiorari raised in Bird's Petition. The Commonwealth also provides additional reasons to grant Bird's Petition.

The Commonwealth concedes that "there is a split among the state courts concerning the proper interpretation of the *Kurth Ranch* decision." Opp at 14. As Bird pointed out in his Petition, the split is irreconcilable, widespread, and continuing. The Commonwealth's response is to argue that only one side of the split should be listened to. This is not an argument against granting certiorari, but rather an argument on the merits. Petitioner Bird believes that there is more validity to the arguments made on the other side of the split. Because the courts below are so hopelessly split, this Court should grant certiorari and allow both sides' positions to be developed in full.

The Commonwealth additionally requests that, if this Court grants certiorari, it should "limit[,] abrogate or overrule the *Kurth Ranch* double jeopardy analysis." Opp at 18. Inherent in the Commonwealth's request is the belief that there is potential tension in this Court's recent double jeopardy messages. Petitioner Bird believes that *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S.

767 (1994) can be read consistently with *United States v. Ursery*, 518 U.S. 267 (1996) and *Hudson v. United States*, 522 U.S. 93 (1997), without denigrating *Kurth Ranch* to a footnote case which applies only to never-again-to-be-duplicated facts. Bird opposes the Commonwealth's attempts to trivialize *Kurth Ranch*. The disagreement between the Commonwealth and Bird about how much of *Kurth Ranch* remains good law and how this Court's recent double jeopardy cases should be read together mirrors the split below on these issues. Certiorari should be granted to clarify the confusion.

The Commonwealth additionally confirms Bird's arguments that several issues of first impression regarding double jeopardy analysis should be addressed by this Court. The Commonwealth argues *Blockburger* issues, Opp at 16-17, and also suggests that order of proceedings makes a difference. *See* Opp at 3-4 and 17-18 (suggesting that a civil proceeding which does not involve loss of life or liberty is incapable of creating jeopardy which could bar a subsequent criminal prosecution, and attempting to distinguish *Kurth Ranch* as involving a situation where the criminal proceeding came first). The Commonwealth additionally raises another issue that should be ruled on by this Court – whether only the base tax rate may be considered for purposes of double jeopardy analysis when a penalty and tax are assessed together. *See* Opp at 3. While Bird believes that even the base rate alone would trigger double jeopardy protections in this case, Bird disagrees that this is the proper way to assess a penalty and tax which the statute authorizes as a package to be imposed on a person in connection with a single possession as a result of an arrest. In sum, Bird takes a position

opposite to the Commonwealth on all three of the issues mentioned in this paragraph, but agrees that these are all issues which this Court should resolve.

Finally, Bird believes the Commonwealth misunderstands the thrust of Bird's points about how Due Process or Excessive Fines arguments might properly enter into this case. Bird's position is that the Double Jeopardy clause, properly construed, requires reversal of the decision below. However, if Bird is wrong in this contention, Bird believes it would be appropriate for this Court to emphasize the reality or lack of reality of any alternative arguments that are available to persons who face the force of the state's punitive power in two separate proceedings. At the time the trial court ruled in Bird's favor, both *Halper* and *Kurth Ranch* were the controlling decisions. The trial court applied *Kurth Ranch* in straightforward fashion to prohibit the Commonwealth from prosecuting Mr. Bird. Neither *Ursery* nor *Hudson* had yet been decided. If the law has changed, or should change as a result of this Court's granting certiorari and rendering a decision on the merits in the instant case (for example if this Court should follow the Commonwealth's suggestion to overrule *Kurth Ranch*), such that there are no longer any double jeopardy protections for persons subjected to dual state punishments across civil and criminal proceedings, Bird would desire to raise in the trial court, after affirmance and eventual remand, any federal and state defenses which have become clear as a result of a changed double jeopardy landscape. This Court would not be asked to reverse the court below on grounds which were not argued to that court, but only to make clear to

the courts below what federal challenges might alternatively be considered.

CONCLUSION

For all the foregoing reasons, as well as for the reasons stated in the Petition for Certiorari, this Court should grant the petition for certiorari.

Respectfully submitted,

R. BURL MCCOY